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In the Supreme Court of the United States

OCTOBER TERM, 1944

RADIO STATION WOW, INC. (A NEBRASKA CORPORATION), WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY (A NEBRASKA CORPORATION), DE E. BRADSHAW, T. E. PATTERSON, FARRAR NEWBERRY, WILLIAM RUESS, W. C. BRADEN, R. E. MILLER, STERLING C. HOLSTON AND JOHN J. GILLIN, JR., PETITIONERS

V.

HOMER H. JOHNSON, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR RESPONDENT IN REPLY TO BRIEF FOR THE UNITED STATES

DON W. STEWART,
Attorney for Respondent

RALPH W. SLOCUM,
A. A. WHITWORTH,
Of Counsel

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SUBJECT INDEX

	Page
STATEMENT	2
ARGUMENT	3
1. The Judgment Should Be Construed to Require the Approval of the Commission to the Transfer of the License to the Society as Stated in the Second Opinion of the Court Below	3
2. Even If the Judgment is not Construed in Accordance with the Views Expressed in the Second Opinion, It Should not be Vacated or Modified without First Giving the Court Below an Opportunity to Make the Correction of What Was at Most a Technical Oversight	5
3. Subject to the Approval of the Commission, the Judgment Properly Directs the Petitioners to do all Things Necessary for the Return of the License to the Society and Lessee Should not be Permitted to Oppose Such Return	5
4. The Judgment Should not be Construed as Attempting to Force the Society to Operate the Station	6
5. The Judgment in the Court Below Need not be Stayed in Order to Preserve the Interests of all Parties and the Public by Keeping the Physical Properties and the License Together	7
6. The Station Should be Valued as a Going Concern and Should Include not only Physical Property but also Good Will	8
CONCLUSION	11

CITATIONS

City of Omaha v. Omaha Water Company, 218 U. S. 180, 202	9
Galveston Electric Company v. City of Galveston, 258 U. S. 388, 396	9
Hotel & Restaurant Employees International Alliance v. Wisconsin Employment Relations Board, 315 U. S. 437, 440, 441	4
National Broadcasting Company v. United States, 319 U. S. 190	9

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STATEMENT

Respondent agrees in general with the views expressed in the brief filed for the United States by the Solicitor General and by the Counsel for the Federal Communications Commission and in particular with the unequivocal and logical statement that the state court has jurisdiction over the physical properties of the station. Such has been the view of the Commission for many years as shown in the decisions cited by the United States (pp. 7-11). Likewise that is exactly the position always taken by respondent and it is also the position taken by petitioners until after the decision in the court below. Then when confronted with an adverse judgment, the petitioners completely reversed their position and for the first time asserted that the state court had no jurisdiction over the physical properties of the station or over any issue in the case.

The Solicitor General and the Counsel for the Commission have made a commendable effort to formulate a procedure which will preserve the interests of the parties and the listening public in the continued operation of this station. Respondent recognizes the desirabilty of not interrupting the operation of the station but believes that such a result may be accomplished without staying the entry of final judgment in the state court.

Respondent's position may be summarized as follows:

1. The judgment should be construed to require the approval of the Commission to the transfer of the license to the Society as stated in the second opinion of the court below.

2. Even if the judgment is not construed in accordance with the views expressed in the second opinion, it

should not be modified without first giving the court below an opportunity to make the correction of what was, at most, a technical oversight.

3. Subject to the approval of the Commission, the judgment properly directs the petitioners to do all things necessary for the return of the license to the Society and lessee should not be permitted to oppose such return.

4. The judgment should not be construed as attempting to force the Society to operate the station.

5. The judgment in the court below need not be stayed in order to preserve the interests of all parties and the public by keeping the physical properties and the license together as suggested by the United States.

6. The station should be valued as a going concern and should include not only physical property but also good will.

These points will now be discussed under appropriate headings.

ARGUMENT

1. The Judgment Should Be Construed to Require the Approval of the Commission to the Transfer of the License to the Society as Stated in the Second Opinion of the Court Below

The United States in its brief states (p. 12) that the judgment should be vacated insofar as it attempts to set aside the transfer of the license and order its return to the Society. Respondent believes the judgment should be construed to require the approval of the Commission to a transfer of the license and when so construed it properly requires the parties to do all things necessary for the pur-

pose. It is true that the judgment orders that the transfer of the license be vacated, the license returned to the Society and the lessee directed to do all things necessary for that purpose (R. 745) and the judgment was not modified when the motions for a rehearing were denied (R. 794). However, the opinion filed in connection with the denial of those motions specifically states (R. 797):

> "the question of the federal license being a question solely for the Federal Communications Commission. Our former opinion should be so construed."

Again it says (R. 798):

> "this court has no power to set aside or vacate the license of the Federal Communications Commission to operate the radio station, that being a matter exclusively within the granted power of the commission, * * * Any statements in our former opinion on this subject are therefore to be construed in accordance with this opinion."

While the court below in its second opinion did not specifically state that its judgment was being modified, yet that was apparently the intention of the court. The language in its first opinion relating to the transfer of the license (R. 761) is in all material respects the identical language found in the judgment (R. 745). Therefore, the construction placed on that language in the second opinion should be applied to the same language as used in the judgment. The fact that the court did not formally modify its judgment when its intention is so clearly expressed in its second opinion should not require this court to modify the judgment.

This court in *Hotel & Restaurant Employees International Alliance* v. *Wisconsin Employment Relations Board*, 315 U. S. 437, 440 441, apparently gave effect to the con-

struction of an order by a state court. This construction was contained in an explanatory opinion denying a rehearing just as in the present case.

It would therefore appear proper and reasonable to apply the construction contained in the second opinion to the same language used in the judgment.

2. Even If the Judgment is not Construed in Accordance with the Views Expressed in the Second Opinion, It Should not be Vacated or Modified without First Giving the Court Below an Opportunity to Make the Correction of What Was at Most a Technical Oversight

It is clear from the second opinion that the court intended its directions as to the license were to be subject to the approval of the Commission. The fact that the judgment was not specifically modified accordingly was, at most, a mere technical oversight. If this court believes it should be corrected it would seem that the court below should first be given an opportunity to make that correction rather than for this court to either vacate the judgment or to modify that portion relating to the license by making it subject to the approval of the Commission.

3. Subject to the Approval of the Commission, the Judgment Properly Directs the Petitioners to do all Things Necessary for the Return of the License to the Society and Lessee Should not be Permitted to Oppose Such Return

The United States suggests (p. 13) that the judgment prevents the lessee from opposing the return of the license

to the Society and from applying for a new license to operate a station in Omaha on the same frequency should it become equipped to do so. The judgment is correct in that respect. It would certainly not be proper to permit the lessee to attempt to prevent the Society from securing a return of all that it lost through this fraudulent transaction. It is, of course, obvious that the physical property is more valuable when it is being operated as a going business and the Society could not so operate it if its license and wave length were retained by the lessee. If the Commission permitted the lessee to retain the license and wave length, it would in effect be condoning the fraud of petitioners. To permit lessee to retain the license and wave length which are necessary to the operation of the station by the Society as it was operated prior to the lease would be most inequitable and unfair to the Society and result in irreparable damage to it.

4. The Judgment Should not be Construed as Attempting to Force the Society to Operate the Station

The United States suggests (p. 13) that "the state court may not require the Society to come before the Commission and apply for authority to operate a broadcasting station if the Society" does not want to operate one. The respondent does not believe that the opinion justifies that construction. What the court below attempted to do was to place the parties in the position they occupied before the lease was made. That is the proper procedure when a fraudulent transaction is set aside. The Society, however, is not forced to operate the station and it can make some other proper disposition with the approval of the Commission. It can ask the Commission to approve the re-assignment of the license to

it and also approve the assignment of the license by it to another lessee or to a purchaser of the station.

5. The Judgment in the Court Below Need not be Stayed in Order to Preserve the Interests of all Parties and the Public by Keeping the Physical Properties and the License Together

We agree with the United States (p. 15) that the physical properties and the license should be kept together in order to preserve the interests of all parties and also the listening public. However, we do not believe this requires "a stay of final judgment in the court below until the Commission has had an opportunity to pass upon an application for the transfer of the broadcasting license" as suggested by the United States (p. 14).

The final judgment in this case should not depend on the disposition made of the station by the Society. If this court affirms the judgment or even if it modifies the judgment to conform to the second opinion, the court below will then remand the case to the trial court for a hearing on the accounting and other matters mentioned in the judgment (R. 745). The time which will necessarily intervene between the decision of this court and the hearing in the trial court should provide sufficient opportunity for the petitioners to apply to the Commission for consent to the assignment of the station license to the Society. If the Society still wishes to dispose of the station, or in any event, if the Commission believes the Society should dispose of the station, then the Commission could fix a reasonable time in which the Society should make such disposition. Surely the Commission in fulfilling its duty to protect the interest of the listening public would co-

operate in thus continuing the operation of the station until the Society has a reasonable opportunity to dispose of it.

If before a final decree should be entered by the trial court, the Society made some disposition of the station and license, subject to the approval of the Commission, then the parties could submit the transaction to the trial court for approval. But we believe many difficulties might arise if the entry of a final decree in this case by the trial court was ordered deferred until the court and the Commission approved a disposition of the station and license. If necessary, the trial court could allow a reasonable time within which the consent of the Commission might be obtained to a transfer of the license and could retain jurisdiction to pass upon any disposition of the station by the Society, but the decree should be final as to all other matters.

6. The Station Should be Valued as a Going Concern and Should Include not only Physical Property but also Good Will

The United States discusses the value of the station and states (p. 16) that the value of the physical property of the station is worth not more than $175,000 and in footnote 3 it is said: "The cost of the physical equipment was $175,000." This statement was probably taken from petitioners' brief (p. 52) but the record cited (R. 581) does not support it. The reference to the cost of the equipment as being $175,000 was merely a part of a hypothetical question and not an answer (R. 581). The lease shows that in addition to the station equipment there was other property included (Ex. 1 to Answer, R. 21, 22). The Society spent $169,000 on equipment for the

station in 1935 (R. 451). The record does not appear to show the value of the physical property.[1]

Whatever the value of the physical properties may be, it would not determine the value of the station as a going concern. This court has frequently held in cases involving utilities that the standard for the value of such property is its value as a going concern. In *City of Omaha* v. *Omaha Water Company*, 218 U.S. 180, 202, it is said:

> "The value, in equity and justice, must include whatever is contributed by the fact of the connection of the items making a complete and operating plant. The difference between a dead plant and a live one is a real value, and is independent of any franchise to go on, or any mere good will as between such a plant and its customers."

The franchise mentioned would be similar to the license to operate the station.

In *Galveston Electric Company* v. *City of Galveston*, 258 U.S. 388, 396, it is said:

> "In determining the value of a business, as between buyer and seller, the good will and earning power due to effective organization are often more important elements than tangible property."

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[1]The Society was one of the plaintiffs in the suit to set aside the Chain Broadcasting Regulations promulgated by the Commission. National Broadcasting Company v. United States, 319 U. S. 190. In the record (p. 5) there appears in paragraph 14 the following allegation in the petition signed by the Society: "Station WOW, owned and operated by Woodmen as aforesaid, represents an investment by Woodmen in assets (other than good will) having a present value in excess of $175,000, and said Station WOW is a going concern which, during its 18 years of operation by Woodmen, has created values for Woodmen of over $500,000 in good will." The same statement appears on page 256 of that record in paragraph 3 of an affidavit by John J. Gillin, Jr., general manager of station WOW and one of the petitioners in the present case.

The opinions of the court below do not give any value to the license; in fact, the second opinion specifically states (R. 797):

> "Such a license is a permissive grant of a privilege and creates no fixed property right in the license."

It is true the value of the station is much less if it cannot be operated but the difference is not attributable to the license. The value of a packing company such as Armour's or Swift's would decline substantially if the government denied it a license to operate and yet it would hardly be logical to say that the difference in value represented the value of the government license. The license is simply one of the elements necessary to permit the business to operate and if it makes a profit from such operation the value of the business is greater than the value of its physical properties.

The United States recognizes (p. 17) that the value of the station includes good will and going concern value. So does the Commission and apparently Congress. See Appendix to brief for the United States (p. 27). Obviously the station's value would decline substantially if it were unable to continue operation because the license should terminate or for any other reason. It should be assumed, however, that the Commission will do all it reasonably can to permit the continued operation of this station which has such an excellent record, so that the listening public will not be deprived of its broadcasting service.

CONCLUSION

We believe the judgment of the court below should be construed to require the approval of the Commission to the transfer of the license to the Society and the judgment affirmed. If it is not so construed then the court below should be given opportunity to correct its judgment in accordance with the views expressed in its second opinion. We agree with the suggestion of the Solicitor General and Counsel for the Commission that it is desirable to keep the physical properties and the license together so that the operation of the station will not be interrupted. However, difficulties might arise if the trial court is directed to defer entry of a final decree until the court and Commission approved a disposition of the station and license. We believe it would be a more orderly procedure for the trial court to enter a final decree but retain jurisdiction to pass upon a subsequent disposition of the station if desired by the Society.

Respectfully submitted,

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